

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court No. OP 17-0322

ROBERT D. BASSETT,

Plaintiff-Appellant,

v.

PAUL LAMANTIA; CITY OF BILLINGS,

Defendants-Appellees.

PLAINTIFF-APPELLANT'S REPLY BRIEF

On Certified Question from the United States Court of Appeals for
the Ninth Circuit Cause No. DV 15-35045

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ARGUMENT

I. Lamantia and the City’s Argument That This Court Has Applied the Public Duty Doctrine Where the Government is the Direct and Sole Cause of the Injury is Erroneous

The City argues that, contrary to assertions of Bassett, the MTLA, and the Ninth Circuit Court of Appeals (in its Order certifying the question to this Court), this Court has “previously addressed two situations involving the public duty doctrine where a governmental agent was the direct and sole alleged cause of the injury.” Neither of the cases cited by the City, however, involve claims that a governmental agent was the direct and sole alleged cause of the injury.

The first case cited by the City is *Eklund v. Trost*, 2006 MT 333, 335 Mont. 112, 151 P.3d 870. A pedestrian in *Eklund* was injured when he was struck by a vehicle during a high speed chase. 2006 MT 333, ¶ 17, 335 Mont. 112, 117, 151 P.3d 870, 875. The vehicle that struck the pedestrian, however, was being driven by the suspect, and not by the police officers chasing him. *Id.* Clearly, that is not a case where the plaintiff’s injury was caused directly and solely by an officer.

The second case cited by the City is *Eves v. Anaconda-Deer Lodge County*, 2005 MT 157, 327 Mont. 437, 114 P.3d 1037. In *Eves*, a man who had voluntarily committed himself to the Montana State Hospital, later left the hospital and ended up dying of exposure to the natural elements. 2005 MT 157, ¶¶ 4-5, 327 Mont. 437, 438-39, 114 P.3d 1037, 1038. This, again, is a case involving a claim that the

government failed to protect the decedent from some outside harm, i.e., the near freezing temperatures and snow.

Lamantia argues that this Court has never limited the public duty doctrine to injuries to third parties. All of the cases cited by Lamantia in support of this argument are federal district court cases, and not cases decided by this Court, but we will address them nonetheless. The first case cited by Lamantia is *Peschel v. City of Missoula*, 664 F.Supp.2d 1149 (D. Mont. 2009). Lamantia is correct that the plaintiff in *Peschel* alleged that the police officers were solely responsible for his injuries. The plaintiff in *Peschel*, however, was put under arrest during the events and the court ruled that the custody exception to the public duty doctrine applied. This fact clearly differentiates the plaintiff in *Peschel* from Bassett. Bassett was not under arrest, he was not a suspect, or even a tortfeasor. He was an innocent bystander, standing on his own private property. The court in *Peschel* did not have to reach the question presented here because it ruled that the custodial exception applied. The case is therefore not instructive to the case at hand.

Lamantia next cites to *Estate of Peterson v. City of Missoula*, 2014 WL 3868217 (D. Mont. 2014). In *Peterson*, the plaintiff, decedent's mother, alleged that the police officer pressured the decedent to act as a confidential informant for the Missoula Police Department, and that pressure led to the decedent's suicide. This case is plainly not a case where a law enforcement officer was the direct and sole

cause of the injury. The decedent in *Peterson* shot himself in the head with a rifle. 2014 WL 3868217, at *6. Although the plaintiff alleged that negligence on the part of the officer ultimately led to the decedent's suicide, she did not allege that the officer's direct physical contact with the decedent was the sole cause of his death.

The final case cited by Lamantia is *Wagemann v. Robinson*, 2015 WL 3899226 (D. Mont. 2015). The plaintiff in *Wagemann* sought damages for alleged mistreatment during four encounters with police officers. 2015 WL 3899226, at *2. Of the four incidents described by the court, only one—the February 24, 2010 aggravated assault charge—involved any sort of physical contact between the plaintiff and an officer. *Id.* at *3-6. In the discussion of the negligence claims, the court held that “to the extent the negligence claims are premised upon Wagemann’s arrest for aggravated assault on February 24, 2010, they are barred by the applicable limitations period.” *Id.* at *21. The court then held that any negligence claims based on the remaining incidents were precluded by the public duty doctrine. *Id.*

As explained above, the remaining three incidents did not involve any physical contact between the plaintiff and any officers, or the plaintiff and any others, for that matter. *Wagemann*, 2015 WL 3899226, at *3-6. It is unclear what, exactly, the negligence claims were based on¹, but it is clear that the claims did not

¹ The court explained Wagemann’s claims as follows: “Wagemann asserts gross negligence and negligence claims against the police officers for breach of ‘various legal and statutory duties that they owed [him] and [their conduct] fell below the

involve any physical injury to plaintiff. That the court in that instance applied the public duty doctrine does not lend any support to the Lamantia's assertion that it should be applied here.

The cases cited by the defendants-appellees fall into one of two categories: Cases where the harm was caused by a third-party actor, or by some other outside force and the claim is that the government failed to protect the plaintiff from that harm; or, cases where the plaintiff was arrested and therefore the custody exception to the public duty doctrine applied. Bassett does not take issue with applying the public duty doctrine in cases where the plaintiff claims the government failed to protect an individual from a third-party actor or an outside force.

Cases where the court has applied the custodial exception to the public duty doctrine are not instructive to the instant case, where no arrest was made. The argument does seem to suggest, however, that Bassett would have been better off as a suspect than an innocent bystander. Say, for instance, that Lamantia had tackled the suspect he was chasing through Bassett's yard, and in doing so, the suspect's rotator cuff was torn. The suspect's negligence claim would not be barred by the

applicable standard of care[.]' He does not specify further what legal and statutory duties were owed, how the police officers breached them, or what standard of care applied and was violated." *Wagemann*, 2015 WL 3899226, at *20 (internal citations omitted).

public duty doctrine, as the custodial exception would most certainly apply. Certainly that cannot be the desired result.

II. The Certified Question is Not Negated by the Possibility of Comparative Fault

The City and Lamantia argue that Lamantia was not the sole cause of Bassett's injury. They claim that both the male suspect being chased and Bassett share some comparative fault for the injury. They argue that this possibility of comparative fault negates the basis of the certified question. This focus on comparative fault is misguided and misses the point of the certified question.

Regardless of whether the fleeing suspect or Bassett are partially to blame for the incident, there is no question that Bassett was injured as a result of direct physical contact with Lamantia. That is the difference between this case and other Montana cases where the public duty doctrine has applied—here there is no claim that Lamantia failed to protect Bassett from some outside harm. Rather, the claim is that Lamantia himself injured Bassett.

That is not to say that questions of comparative negligence are irrelevant to the case; those are questions of fact that can be presented to the jury, as they would be in any case involving a claim of negligence.

CONCLUSION

Contrary to the claims of Lamantia and the City, this Court has never applied the public duty doctrine to a case where a law enforcement official was the direct and sole cause of the plaintiff's injury.

What Bassett is advocating for would not expose Montana governments to endless litigation for every innumerable error. Bassett is not contending that local governments and law enforcement officers should be liable for every injury resulting from every error committed. Bassett does not argue that governments should be liable when they fail to protect a member of the public from harm resulting from a third party, or from some outside force. Bassett's only request is that when an innocent bystander, who was standing in his own yard, is negligently injured by a police officer after direct physical contact, that the government and the officer accept responsibility for that injury.

Government officials who commit direct acts of negligence that result in physical injury to Montana citizens should not have a blanket of immunity under the public duty doctrine, simply because governments fear "endless" litigation. Holding government officials liable for the physical injury resulting from their direct acts of negligence protects members of the public, even if they are acting within the course of their duties as public officials. To not hold these officials to any standard of care

leads to a result where officials are given a “free pass”, no matter how negligent their acts may be.

Plaintiff Bassett requests this Court to answer the certified question from the Ninth Circuit Court by holding that under Montana law, the public duty doctrine does not shield a law enforcement officer from liability for negligence where the officer is the direct and sole cause of the harm suffered by the plaintiff.

DATED this 6th day of September, 2017.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Reply Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Office Word 2016, is 1,587 words, including all text, excluding table of contents, table of authorities, certificate of service, and certificate of compliance.

DATED this 6th day of September, 2017.

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